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No. 09-231

In the
Supreme Court of the United States

CHARLES BROWN, et al.,

Petitioners.

v.

DAVID HOVATTER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. The Commerce Clause forbids states from making or enforcing laws that burden interstate commerce excessively relative to the laws' putative local benefits. A Maryland law forbidding corporate ownership of funeral homes places substantial burdens on interstate commerce because it makes it impracticable for residents of other states to participate in the domestic funeral home market. Is the law immune from Commerce Clause scrutiny because it restricts the interstate flow of capital rather than the flow of goods or services?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioners.[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts. PLF's Economic Liberty Project defends the individual's right to earn a living both through direct litigation and by participating as amicus curiae in appellate courts in cases like these. PLF attorneys successfully represented the plaintiff in the important occupational licensing case *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), and participated as amicus curiae in such cases as *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005), and *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). PLF attorneys have also published extensively on the subject of economic liberty and the abuse of the law for protectionist purposes. *See, e.g.*, Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

14 Wm. & Mary Bill Rts. J. 1023, 1027 (2006); Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. Ill. U. L. Rev. 457 (2004). PLF believes its public policy experience will assist this Court in its consideration of the petition for certiorari.

SUMMARY OF REASONS FOR GRANTING THE PETITION

States often use limits on corporate ownership to burden interstate competition in favor of in-state interests. *See, e.g., Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008), *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006). In *Pike v. Bruce Church*, 397 U.S. 137 (1970), this Court formulated a balancing test for evaluating the constitutionality of state laws that burden interstate commerce but that do not explicitly discriminate against out-of-state interests. Under that test, a court must judge whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. This balancing test was created to protect the "area of free trade among the several States," *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

Unfortunately, courts and commentators are now in disarray as to when that test applies. That confusion is attributable to this Court's decision in *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978), which appeared to create a threshold test barring consideration of the *Pike* factors whenever a law burdening interstate commerce "does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state

companies in the retail market." *Id.* at 126. Relying on this language, the court below held that the Dormant Commerce Clause applies only to laws that interfere with the interstate flow of goods and services, not to laws that restrict out-of-state business practices, no matter how disproportionate their burden on interstate commerce.

Yet this Court has never held that such laws are exempted from *Pike*'s balancing test. Indeed, in *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977), which remains valid law, this Court did apply *Pike* balancing to a law that restricted business practices rather than the actual flow of goods. This Court should therefore grant certiorari for three reasons:

1. The Court should reconcile *Pike*, *Hunt*, and *Exxon*, to clarify whether a state law that significantly burdens out-of-state businesses in a manner that is disproportionate to its purported local benefits, but which does not limit the flow of actual goods and services, is subject to Dormant Commerce Clause scrutiny. *Exxon* and *Hunt* conflict on this issue: *Exxon* refused to apply the *Pike* balancing test, while *Hunt* did apply it. The Court should take the opportunity to clarify that the same, meaningful scrutiny applies to *all* state economic restrictions that burden interstate commerce disproportionately to local benefits.

2. The Court should clarify that the *Pike* test requires courts to scrutinize a challenged law's "putative local benefits," 397 U.S. at 142, with more skeptical scrutiny than the deferential standard employed by the court below. If courts apply a rational basis-style deference to a state's assertions that a challenged law advances an important local interest,

then states will face no serious limit on their ability to burden interstate commerce for the benefit of in-state interests. *Pike* balancing enables courts to determine whether local benefits predominate over the burden on interstate commerce or whether those local benefits are minor or pretextual. *See, e.g.*, *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 569 (4th Cir. 2005), *cert. denied sub nom. Smit v. Yamaha Motor Corp., U.S.A.*, 546 U.S. 936 (2005) ("A statute need not be perfectly tailored to survive *Pike* balancing."). But deference to a state's assertions that a law advances important local interests would swallow up the balancing required by *Pike*: it would mean that the balance would always tip in favor of the protectionist law. This would transform the Commerce Clause into a mere formalism, emptying it of real protective force. *Cf. Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 433 (1947) ("What lifts the [dormant commerce clause] from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences.").

The Dormant Commerce Clause has always imposed a more serious limit on state restrictions of interstate commerce than the Fourth Circuit recognized here. This Court has long read the Commerce Clause as barring states both protectionist acts, whether explicit or implicit, "forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). The balancing test established in *Pike* is crucial to that effort. Yet, due to the conflict between *Exxon* and *Hunt*, it remains unclear whether that test applies in a case like this, where the challenged law restricts not the flow of goods and services, but the method by which interstate commerce is conducted.

and does so in a manner that provides protectionist benefits to in-state interests. These complex issues have generated enough inter-circuit conflict to warrant review by this Court.

ARGUMENT

I.

THE COURT SHOULD RESOLVE WHETHER THE DORMANT COMMERCE CLAUSE PROTECTS THE UNHINDERED FLOW OF INTERSTATE COMMERCE OR ONLY THE INTERSTATE FLOW OF GOODS AND SERVICES

A. This Court Has Frequently Applied *Pike*'s Dormant Commerce Clause Test to Laws Burdening Interstate Commerce, Even If Those Laws Do Not Diminish the Actual Flow of Goods and Services

1. The Commerce Clause Protects Interstate Commerce, Including Investment as Well as the Trade in Goods and Services

"[T]he Framers of the Commerce Clause had economic union as their goal." *Dennis v. Higgins*, 498 U.S. 439, 454 (1991). The framers intended that every citizen should have "free access to every market in the Nation" and know "that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." *H. P. Hood & Sons, Inc. v.*

Du Mond, 336 U.S. 525, 539 (1949). By removing the power to control interstate commerce from the states, and giving that power exclusively to Congress, the framers hoped to create "a national free market." *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992).

This Court's Dormant Commerce Clause jurisprudence has never explicitly distinguished between the interstate flow of goods and services on one hand and the interstate flow of capital and investment on the other. Yet the decision below turns on such a distinction; it asserts that while "burdens placed on the interstate movement of goods, materials, or other articles of commerce" are subject to Dormant Commerce Clause scrutiny, a prohibition on corporate ownership that restricts or eliminates the freedom of out-of-state investors to participate in the Maryland market is "not [a] matter[] protected by the dormant Commerce Clause." *Brown v. Hovatter*, 561 F.3d 357, 365 (4th Cir. 2009).

Goods and services bought and sold across state lines are only the most obvious examples of interstate commerce. But commerce in the national marketplace routinely involves trading money, securities, and other intangible economic values. In fact, goods frequently *are* capital investments, *see* George Reisman, *Capitalism: A Treatise on Economics* 445-46 (1996), and there is no textual or historical basis for distinguishing between one and the other for purposes of the Dormant Commerce Clause doctrine. This Court has often treated investment purchases the same as other kinds of goods in cases involving Dormant Commerce Clause challenges. *See, e.g.*, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328-29 (1977). The question in these cases is whether a state

commercial regulation creates something like a tariff against out-of-state businesses—not whether the regulation ultimately decreases the in-state consumer's access to products and services.

2. *Pike*'s Balancing Test Should Apply to All Types of Trade, Including Matters Involving Investment

In *Pike*, an Arizona law required cantaloupes exported across state lines to be shipped in packages of an approved design. 397 U.S. at 139-40. The state claimed this restriction did not interfere with interstate commerce, *id.* at 140-41, and that the state had a legitimate interest in ensuring that produce sent out of Arizona was of good quality. *Id.* at 142-43. The law did not actually restrict the shipment of goods or impose a tax on exports, but it limited the method of doing business in a way that diverted trade, imposed higher business costs on out-of-state businesses, and did so in service of a "minimal" state interest. *Id.* at 146. The Court weighed the burden the statute imposed on interstate commerce against its putative local benefits, and concluded that it erected an invalid barrier against interstate trade. *Id.* at 145-46.

In *Boston Stock Exch.*, this Court found that a special transfer tax imposed by New York on investment securities purchased in other states was unconstitutional because it "impose[d] a greater tax liability on out-of-state sales than on in-state sales," *id.* at 332, and caused "the flow of securities sales [to be] diverted from the most economically efficient channels and directed to New York. This diversion of interstate commerce and diminution of free competition in securities sales are wholly inconsistent with the free

trade purpose of the Commerce Clause." 429 U.S. at 336.

New York argued that the tax did not affect out-of-state transactions, because it was only imposed when securities changed hands within the State of New York. Yet the practical effect of the tax was to give a competitive edge to security purchases inside of New York, at the expense of other states. The state was using its taxing power to " 'requir[e] business operations to be performed in the home State that could more efficiently be performed elsewhere.' " *Id.* (quoting *Pike*, 397 U.S. at 145). The Second Circuit Court of Appeals summed up these cases in *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001), when it said that "[a] regulation may disproportionately burden interstate commerce if it has the practical effect of *requiring out-of-state commerce to be conducted at the regulating state's direction*," (emphasis added).

These cases indicate that the Dormant Commerce Clause does not merely forbid states from creating tariffs or other barriers against the shipment of goods or the provision of services; rather, it forbids states from enacting laws that burden interstate commerce to a degree that is disproportionate to the local benefits the state claims are served by the law. Thus, restrictions that interfere with investments and with other business operations can violate the Commerce Clause where they form an unreasonably serious barrier against cross-border commercial activity—whether it be purchases, investments, or other commercial activity.

Yet in this case, the court of appeals concluded that Dormant Commerce Clause scrutiny does not

apply *at all* to a law that, by limiting the ownership of funeral homes to Maryland-licensed individuals, practically forbids out-of-state investors from participating in the funeral services market. Certiorari is warranted to determine whether state restrictions on the interstate flow of capital are subject to the same Dormant Commerce Clause scrutiny as are other types of state-created barriers to commerce.

B. This Court's Decision in *Exxon* Seemed to Hold, in Conflict With *Hunt*, That the *Pike* Test Does Not Apply to Laws That Burden Interstate Commerce If Those Laws Do Not Disrupt the Flow of Goods and Services

The court below concluded that the Dormant Commerce Clause did not restrict Maryland's power to control "the manner of professional practice," even if those controls imposed a burden on interstate commerce that was disproportionate to local benefits. 561 F.3d at 365. Thus even if Maryland's law limiting the ownership of funeral homes exclusively[2] to individuals licensed as funeral directors has minimal local benefits had a maximal impact on interstate commerce, it would be immune from Dormant Commerce Clause review.

The court of appeals based its conclusion on this Court's decision in *Exxon*, 437 U.S. 117, a case in which this Court rejected a Commerce Clause challenge to a Maryland law that did not facially discriminate against out-of-state businesses, but had

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[2] Except for the 58 corporations grandfathered in under the 1945 statute prohibiting corporate ownership.

a significant effect on interstate commerce. That law imposed certain divestiture requirements on gasoline refiners and forbade them from charging some of their retailers less than others for gasoline. 437 U.S. at 119-20. The refiners argued that the law burdened interstate commerce because it would cause some refiners to stop selling gasoline in Maryland and because it discriminated against refiners located in states other than Maryland.

The Court rejected the Dormant Commerce Clause challenge, and declined to use the *Pike* test, observing that while some refiners might withdraw from the Maryland market, this would only cause other refiners to enter the market to supply existing retailers. Thus the actual flow of products would not be disturbed. As the Court wrote, "particular interstate firms" are not protected by the Commerce Clause; that provision only protects "the interstate market." *Id.* at 127. *Exxon* appeared to create a special category of Dormant Commerce Clause cases: if "[t]he source of the consumers' supply" is made up by another supplier, *id.*, rather than being curtailed or eliminated, a state restriction that imposes disproportionately heavy burdens on out-of-state businesses is not subject to the *Pike* test. *Exxon* "came as a shock to believers in balancing." Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1234 (1986).

Exxon contrasted with the earlier case of *Hunt*, 432 U.S. 333, which used *Pike* balancing to strike down a North Carolina law barring apple sellers from using any quality rating system except the one established by the USDA, if those apples were shipped in closed containers. *Id.* at 337. The law meant that apple

sellers from Washington who shipped their apples in containers could not employ Washington rating terms like "fancy" or "extra fancy." *Id.* at 348-49. This increased the cost of business for Washington apple sellers in North Carolina. *Id.*

The law was facially neutral, *id.* at 352, and there was no indication that the supply of apples was actually diminished by it.[3] Indeed, like the laws challenged in the present case and in *Exxon*, the North Carolina apple regulation did not restrict the flow of goods or services, or apply solely to out-of-state businesses, but did restrict business methods in a way that disproportionately burdened out-of-state firms. Nevertheless, the Court applied the *Pike* test. 432 U.S. at 350. This was consistent with the decision in *Boston Stock Exch.*, 429 U.S. at 336, issued the same year, which held that economic regulations are subject to analysis under *Pike* when they "requir[e] business operations to be performed in the home State that could more efficiently be performed elsewhere."

Thus the question remains whether the *Pike* test is appropriate when the challenged law does not restrict the actual flow of products or services, but burdens interstate commerce by limiting how out-of-state businesses may practice their trade. *Hunt* appears to hold that the test is applicable; *Exxon* that it is not.

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[3] There also appears to be no reason to think the shipment packaging requirement struck down in *Pike* wold have reduced the interstate flow of cantaloupes, yet the Court found that requirement invalid under the Commerce Clause. *See* Regan, *supra*, at 1238 n.337.

C. This Conflict Over When *Pike* Balancing Applies Has Caused Significant Confusion Between the Courts of Appeals and Even Within the Fourth Circuit

Exxon did not overrule *Hunt*, but distinguished it in a way that has caused substantial confusion. *See* Regan, *supra*, at 1236; Brannon P. Denning, *Reconstructing Dormant Commerce Clause Doctrine*, 50 Wm. & Mary L. Rev. 417, 464-67 (2008) (The contrast between *Exxon* and *Hunt* is "particularly troublesome for those who attempt to extrapolate principles from them."). The *Exxon* Court held that *Hunt* was inapplicable because the North Carolina apple regulation "raised the cost of doing business for out-of-state dealers, and, in various other ways, favored the in-state dealer in the local market," but the restrictions on gasoline dealers did not give any kind of "competitive advantage over out-of-state dealers." 437 U.S. at 126. Yet, in a footnote, the Court acknowledged that "[i]f the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market," the regulation "may have a discriminatory effect on interstate commerce." *Id.* at 126 n.16. Thus *Exxon* left undecided the question presented in this case: whether Dormant Commerce Clause scrutiny applies to a restriction that raises the cost of doing business for out-of-state companies, and has the effect of giving an economic advantage to local firms in the total sales market, but does not reduce the actual flow of goods and services into the state.

The Seventh Circuit recently expressed much confusion in *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007), over whether to use the *Exxon* approach, or apply *Hunt* and *Pike*. *See, e.g., id.* at 556 ("That makes us wonder just what work *Pike* does."). The Sixth Circuit, also uneasy as to which approach to use, observed in *Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544, 554 (6th Cir. 2001), that *Exxon* revealed "a willingness on the part of the Supreme Court to engage in some fairly fine slicing and dicing of the practical effects of state legislation in order to avoid the necessity of finding the legislation discriminatory" and "manifest[ed] an obvious reluctance to push cases such as *Hunt* . . . to their logical extremes." And in *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398-99 (9th Cir. 1995), the Ninth Circuit concluded that *Exxon* controlled—but proceeded to apply the *Pike* balancing test, evidently overlooking the fact that when *Exxon* applies, *Pike* balancing does not.

This confusion has led to inconsistent results and "furnished subsequent courts with a convenient way to avoid striking down state laws in close cases." Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 Urb. Law. 907, 929 (2005). For example, the decision below conflicts directly with the First Circuit's decision in *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), and the Eleventh Circuit's decision in *Island Silver & Spice*, 542 F.3d 844.

In *Rullan*, the court struck down a Puerto Rico statute that required new pharmacies to obtain approval from the Secretary of Health. 405 F.3d at 52.

But when a new pharmacy sought approval, the Secretary was required to notify the existing pharmacies and allow them to object, whereupon the applicant was subjected to a hearing to evaluate the effect the new competition would have on existing businesses. *Id.* at 53. This undeniably anti-competitive statute was facially neutral, *id.* at 55, and did not disrupt the flow of goods or services across state lines. *Id.* at 57 n.5. Yet it created a significant barrier against new companies entering the Puerto Rico market, *id.* at 57, and, like the Maryland funeral home law, gave protectionist benefits to existing in-state pharmacies which were grandfathered in. *Id.* at 54-56. Although the law "treat[ed] 'newcomers' equally, it [gave] an on-going competitive advantage to the predominantly local group of existing pharmacies," *id.* at 58, and allowed the Secretary to "protect[] the mostly local group of existing pharmacies from competitive pressure. That the Secretary subjects all newcomers to this discriminatory scheme does not ameliorate the constitutional infirmity." *Id.*

The court of appeals explicitly rejected the argument that *Exxon* should control, and applied *Pike* instead. "Unlike *Exxon*," the panel wrote, where "the only result of the statute would be to 'cause some business to shift from one interstate supplier to another,' the statistics in this case strongly suggest that the Act helps to perpetuate local dominance of the Puerto Rico pharmacy market." *Id.* at 59. Yet this suggests that the choice of applicable constitutional principle hinges on the quality of statistical evidence submitted to the court regarding the economic forecasts of out-of-state business firms. Whether the legal analysis should depend on such a quantitative

difference is questionable, and *Rullan* has already been criticized on this ground by at least one court. *See Fla. Transp. Serv., Inc. v. Miami-Dade County*, 543 F. Supp. 2d 1315, 1327 (S.D. Fla. 2008).

Island Silver & Spice also conflicts with the Fourth Circuit's analysis in this case. There, the Eleventh Circuit invalidated an ordinance barring national chain stores within a municipality. Like the Maryland funeral home law, that ordinance did not prohibit the flow of products or services, but merely regulated the manner in which businesses could operate within the jurisdiction. 542 F.3d at 846. Although the ordinance was facially neutral, its practical burden was laid disproportionately upon interstate trade. *Id.* at 846-47. Thus the case would appear to fall within the *Exxon* category, yet the court applied the *Pike* test. *Id.* at 847-48.

The most striking example of the confusion in lower courts over the applicability of *Pike* lies in the contrast between this case and another Fourth Circuit decision, *Yamaha Motor Corp.* That case, markedly similar to *Rullan*, struck down a Virginia law that protected motorcycle dealerships against competition by allowing existing dealers to block the opening of a new dealership. 401 F.3d at 563-64. The law was facially neutral and bore at least some relationship to a legitimate state interest. *Id.* at 568. Although it caused a reduction in competition between brands of motorcycle, *id.* at 572, there was no indication that the law restricted the flow of motorcycles to consumers. Thus, as in *Exxon*, the Virginia statute arguably limited only the method of business operations within the state, and not the flow of goods and services. Yet, just as the Fourth Circuit in this case did not cite *Hunt*

or *Pike*, the Fourth Circuit in *Yamaha* did not cite *Exxon*. Instead, it proceeded to apply the *Pike* balancing test, holding that the test is appropriate "where interstate commerce is burdened by a state law that imposes barriers to market entry." *Id.* at 573.

Yamaha's similarity to the present case is striking: in both cases, a facially neutral state law restricting the types of businesses that may operate in the market imposed a heavier toll on out-of-state interests than in-state interests, and whatever the effect on the flow of goods and services, it seriously restricted the ability of businesses to enter the market and compete.[4] Yet the *Yamaha* panel, citing *Hunt*, applied *Pike* to balance the burden on interstate commerce against the putative local benefits. *Id.* Thus the confusion over the applicability of *Pike* balancing has led to inconsistent results even within the Fourth Circuit.

This Court should grant review to reconcile *Exxon* and *Hunt*, and clarify when *Pike*'s balancing test applies to facially neutral state economic regulations that impose especially heavy burdens on out-of-state interests, and create protective barriers around in-state interests. *Exxon* seems to hold that *Pike* does not apply when the restriction affects only the method of doing business rather than the actual flow of goods and services. But *Hunt* and *Pike* invalidated facially

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[4] The panel below distinguished *Yamaha* on the grounds that it "was aimed at the *interstate flow* of motorcycles into Virginia," 561 F.3d at 366. But the *Yamaha* court went out of its way to note that the statute was facially *neutral*. 401 F.3d at 568. Although the costs fell predominantly on out-of-state interests, thanks to the benefits accorded to in-state interests, *id.* at 573, this is equally true of the law challenged here.

neutral restrictions which did not limit the flow of products, but burdened out-of-state producers in ways that distorted the market and deprived out of state businesses of competitive opportunities. The confusion caused by these two cases is widespread and has led to inconsistent results in several circuits, and within the Fourth Circuit. This case is an appropriate opportunity to harmonize these decisions and protect the "national free market." *Wyoming*, 502 U.S. at 469.

II

COURTS ARE DIVIDED ON THE COMMERCE CLAUSE SCRUTINY THAT THEY SHOULD APPLY TO THE RELATIONSHIP BETWEEN A CHALLENGED LAW AND PUTATIVE LOCAL BENEFITS

A. Lower Courts Are Split on Whether They Should Defer to States Under the *Pike* Balancing Test

The Dormant Commerce Clause doctrine forbids states from engaging in explicit discrimination against out-of-state businesses. But, recognizing that legislatures often enact protectionist measures under the pretext of a legitimate exercise of police powers, this Court has repeatedly held that the judiciary cannot confine its analysis to a challenged statute's mere assertion of valid purposes. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (citation omitted) (a court is not bound by" '[t]he name, description or characterization given [a statute] by the legislature or the courts of the State,' but will determine for itself the practical impact of the law."); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) ("The principal

focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects.").

This Court has consistently required lower courts to engage in meaningful scrutiny of a state's justifications for the economic regulations challenged as restrictions on interstate commerce: "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.*, 311 U.S. at 455-56. This means courts cannot be satisfied with the type of deference more typical of the rational basis analysis in due process and equal protection cases.[5] Instead, the precedent calls for a realistic assessment both of the intent and effects of statutes that burden interstate commerce.

The *Pike* test requires courts to weigh a challenged law's burdens on interstate commerce against the benefits to local interests that the state asserts in defense of that law. 397 U.S. at 142. Yet such balancing is not logically possible if courts must simultaneously accept uncritically a state's claims that the law advances an important state interest. That kind of deference would mean the practical abandonment of any real balancing, since the "local benefits" prong of the test would depend on the state's say-so. *Pike*'s balancing test would then be reduced to the functional equivalent of rational basis scrutiny.

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[5] Rational basis deference is so extreme that one judge has jocularly but accurately characterized it as "invit[ing] us to cup our hands over our eyes and then imagine if there could be anything right with the statute." *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

This Court has resisted attempts to water down the *Pike* standard, both because of the ingenuity of state legislatures in erecting barriers against interstate competition, and because legislatures themselves may not be fully aware of the anticompetitive consequences of their own legislation. Since non-residents are not represented in state legislatures, lawmakers might be persuaded by in-state interests to enact legislation that happens to create a barrier against trade across state lines. These possibilities have led the Court to "eschew[] formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). Because "the result" in Dormant Commerce Clause cases "turns on the unique characteristics of the statute at issue and the particular circumstances in each case," *Boston Stock Exch.*, 429 U.S. at 329, courts cannot satisfy their duty by applying deferential scrutiny.

Unfortunately, because the court below followed *Exxon*, it deferred almost without question to Maryland's assertions that the ban on corporate ownership of funeral homes benefits the general public. While admitting that there was very little evidence in the record to explain the law's purpose, *Brown*, 561 F.3d at 367, it took the route of rational basis-style deference, and relied solely on Maryland's "assert[ions]" that the restriction improved accountability, and the "claim" by existing, protected Maryland funeral directors, "that unlicensed individuals and corporations would be less accountable." *Id.* The panel was satisfied by the defendants' bare assertions that the restriction serves the public good - matters for which no actual evidence was adduced. *Id.*

Although the court did not cite any Dormant Commerce Clause decisions to support its deferential approach,[6] other courts have taken a similarly lenient view toward laws challenged under the Dormant Commerce Clause, accepting at face value a state's assertion that a challenged law serves important state purposes. As petitioners have explained, the First, Fifth, Ninth, and D.C. Circuits defer to a state's assertion that a challenged regulation provides public benefits, *see, e.g.*, *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164 (5th Cir. 2007), *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005), *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005), while the Second, Third, Eighth, and Tenth Circuits have refused to apply deferential scrutiny, and require instead that a challenged law actually produce the intended local benefits if it is to survive the applicable balancing test. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 52 (2d Cir. 2007); *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 735 (8th Cir. 2002); *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 216 (3d Cir. 2002); *ACLU v. Johnson*, 194 F.3d 1149, 1161-62 (10th Cir. 1999).

This case represents only the most recent iteration of a growing circuit split on this issue. *See further* James D. Fox, *Note: State Benefits Under the Pike Balancing Test of the Dormant Commerce Clause:*

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[6] The court did cite *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005), but *Powers* was an equal protection and due process case, not a Commerce Clause case. Moreover, that case is in conflict with decisions by the Sixth and Ninth Circuits. *See Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008).

Putative or Actual?, 1 Ave Maria L. Rev. 175, 198-204 (2003). Setting the circuits straight is vital to the continuing significance of the Dormant Commerce Clause doctrine.

B. Rational Basis Scrutiny Would Be Inappropriate in the Dormant Commerce Clause Context

Like the rational basis test itself, such deference would be supremely formalistic. Because courts use it to uphold laws so long as the state articulates even speculative justifications for those laws, the rational basis test can be met even when there is no evidence that the law actually serves the asserted purpose. *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (citations omitted, internal quotation marks omitted) ("the Government has no obligation to produce evidence or empirical data to sustain the rationality of a statutory classification and instead can base its statutes on rational speculation"). This means in practice that states need merely offer some barely rational purpose for their actions to satisfy judicial review.

If "formalism" means a judicial fixation on words and on the ingenious technicalities of legal procedure to the exclusion of the practical realities of the world, *see* Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 607 (1908), then rational basis style deference is the most extreme kind of formalism. This is why Justice Stevens characterized rational basis as "tantamount to no review at all," *FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993), and why the Court acknowledged in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992), that if "the test . . . is whether the legislature has recited a

harm-preventing justification for its action . . . this amounts to a test of whether the legislature has a stupid staff."

Whatever the merits of such an approach in the context of due process and equal protection cases, it cannot be proper in the realm of Dormant Commerce Clause doctrine, where the federal judiciary has repeatedly pledged itself to avoiding formalism and instead seriously policing the freedom of commerce. As the Court noted fifty years ago, "[w]hat lifts the [dormant commerce clause] from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences." *Joseph*, 330 U.S. at 433.

The problem with a formalistic approach is that it is easily evaded with a wink and a nod. *Cf. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 301 n.4 (2001) ("[I]f formalism were the sine qua non . . . the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling."). In fact, in *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951), the Court made a point of differentiating Dormant Commerce Clause scrutiny from the rational basis deference applied in due process cases. If the Court were to uphold a state commercial regulation against a Dormant Commerce Clause challenge "simply because it professes to be a health measure" or other legitimate state action, the Commerce Clause would "impose[] no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate

goods." *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 476 n.2 (1981) (opinion of Powell, J.).

The Court should grant certiorari to reaffirm that in Dormant Commerce Clause cases, courts should not defer to a state's mere assertions that a challenged law serves important public purposes. To do so would hollow out the *Pike* test, since a state's mere assertion of public benefits would bar courts from balancing those benefits against forbidden protectionist effects and would thereby overtake the rest of the analysis. Given the large number of cases from different circuits divided over this point, certiorari is not only warranted but overdue. Lower courts need instruction on whether to defer to a state's assertion that its burdens on interstate commerce are so vital to important local interests as to survive the *Pike* balancing test.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

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Respectfully submitted,

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